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## QUESTION PRESENTED

Whether the ICC can exempt from regulation, pursuant to 49 U.S.C. §10505, a matter related to a rail carrier but not otherwise within the jurisdiction of that agency, to wit: intrastate motor carriage.

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NO. 85-1222 and 85-1267

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

INTERSTATE COMMERCE COMMISSION,
*Petitioner,*

V.

STATE OF TEXAS,
*Respondent,*

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, AND SOUTHERN PACIFIC TRANSPORTATION COMPANY,
*Petitioners,*

V.

THE STATE OF TEXAS,
*Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

# BRIEF OF THE STATE OF TEXAS

## STATEMENT OF THE CASE

These cases were initially brought to the Fifth Circuit as actions for review of orders of the Interstate Commerce Commission (hereinafter "ICC") in Decision No. 39627, *Petition under 49 U.S.C. 11501(c) by Missouri-Kansas-Texas Railroad Company, et al., for Review of an Order of the Railroad Commission of Texas,* served January 23, 1984, (Cert. App. - p. 16a), and in Decision No. 39704, *Petition of Road-Rail Transportation Company, Inc. under 49 U.S.C. §11501(c) for Review of an order of the Railroad Commission of Texas,* served April 13, 1984, (Cert. App. - p. 24a).

On September 27, 1982, Missouri-Kansas-Texas Railroad Company (hereinafter "MKT") filed an application with the Railroad Commission of Texas (hereinafter "RCT") to exempt from regulation, pursuant to 49 U.S.C. §10505, the transportation of trailer on flat car ("TOFC") and container on flat car ("COFC") (collectively "TOFC/COFC") traffic moving in Texas intrastate commerce to the same extent as interstate TOFC/COFC traffic had been exempted by the ICC. Five railroads — Southern Pacific Transportation Company; Atchison, Topeka and Santa Fe Railway; Missouri Pacific Railroad Company; Burlington Northern Railroad Company; and Fort Worth and Denver Railroad Company -- together with the Texas Industrial Traffic League, a shipper's organization, intervened on behalf of the application. The Common Carrier Motor Freight Association intervened in opposition to the application.

An evidentiary hearing was held on December 2, 1982. A Proposal for Decision was served on October 19, 1983. On December 20, 1983, the RCT entered its order exempting TOFC/COFC rail traffic moving intrastate in the State of Texas, from regulation, but excluding from the exemption, incidental pre-rail and ex-rail truck service. (Joint App. - pp. 11-12).

On December 20, 1983, MKT and the intervening railroads filed a petition with the ICC seeking review of the RCT's Order pursuant to 49 U.S.C. §11501(c). After the reply of the RCT, the ICC entered its order granting the entire exemption sought on January 19, 1984. The State of Texas timely brought its Petition for Review of the ICC's Order.

Meanwhile, on May 16, 1983, Road-Rail Transportation Company, Inc. (hereinafter "Road-Rail"), likewise filed an application with the RCT to exempt from regulation, pursuant to 49 U.S.C. §10505, transportation provided by Road-Railers moving in Texas intrastate commerce. Road-Rail also sought exemption to the same extent as interstate TOFC/COFC traffic which had been previously exempted by the ICC, including not only rail movements but those over the highway.

An evidentiary hearing for Road-Rail was held on August 10, 1983. A Proposal for Decision was served on January 17, 1984. On February 28, 1984, the RCT entered its order exempting from regulation Road-Railer traffic moving intrastate in the State of Texas, but excluding from the exemption those portions of the movements over the highways. The RCT's action in this regard was consistent with its TOFC/COFC position in the MKT case decided some two months earlier. (Jt. App. - pp. 24-36).

On March 13, 1984, Road-Rail filed its petition with the ICC seeking review of the RCT's order. The ICC entered another order granting the entire exemption sought on April 11, 1984. Once again the State of Texas timely brought its Petition for Review to the Fifth Circuit, where the two cases were consolidated for oral argument. The Fifth Circuit granted both petitions for review and reversed the ICC orders reasoning that the ICC acted outside its jurisdiction in attempting to exempt intrastate motor carriage. (Cert. App. - pp. 1a-11a).

## SUMMARY OF ARGUMENT

The Interstate Commerce Commission has jurisdiction over interstate rail traffic and, directly or indirectly, over intrastate rail traffic. The ICC also has authority to regulate interstate motor carriers. However, what the Fifth Circuit recognized in the case at bar, is that pursuant to 49 U.S.C. §10521(b) the ICC is prohibited from interfering with the states' regulation of purely intrastate motor carriage.

In the case at bar, the ICC has taken the position that *intrastate* motor carriage is "transportation provided by a rail carrier," thereby bringing such motor transportation within the ambit of ICC jurisdiction. In *American Trucking Association, Inc. v. ICC*, 656 F.2d 1115 (5th Cir. 1981) ("*ATA*"), the Fifth Circuit held that "transportation provided by a rail carrier" included motor vehicle transportation. However, as that same Court[1] below held, and as the State of Texas argues herein, *ATA* concerned *interstate* motor vehicle

1. Rehearing *en banc* was denied in the case at bar. (Cert. App. - Appendix D, p. 12a)

traffic. *Intrastate* motor vehicle transportation is expressly reserved to the states in 49 U.S.C. §10521(b). The State of Texas contends that the ICC's attempted exemption from regulation of the intrastate motor carrier portion of TOFC/COFC traffic was an improper intrusion into an area over which the states retain jurisdiction. The Fifth Circuit below concurred in this conclusion.

The Petitioners have argued strenuously that the actions of the Railroad Commission of Texas were proscribed because the State of Texas had been decertified and that established preemption theories gave the ICC authority to regulate in an area otherwise reserved to the states. Both bases are wrong.

The Court below correctly held that the ICC overstepped its authority when it sought to exempt from regulation the instant motor carrier traffic. Hence, preemption does not apply. Similarly, because intrastate motor carrier regulation is reserved to the states, the issue of Texas's decertification is irrelevant because the states do not need ICC certification to regulate in an area over which they retain exclusive jurisdiction.

## ARGUMENT

### THE ICC HAS NO AUTHORITY TO EXEMPT FROM REGULATION, PURSUANT TO SECTION 10505, MOTOR CARRIAGE WHICH IS PURELY INTRASTATE IN NATURE.

### A. *The ICC's Jurisdiction*

The jurisdiction of the ICC over various forms of transportation is conferred in Chapter 105 of Title 49 of the United States Code. In particular, jurisdiction is found in Subchapter I for railroads, and Subchapter II for motor carriers. Section 10501(a)(1)(a) under Subchapter I, the pertinent provision herein, gives the "Commission jurisdiction over transportation (1) by rail carrier ... that is (A) *only by railroad.*" This jurisdiction applies to (1) interstate rail transportation, (49 U.S.C. §10501(a)(2)), and (2) intrastate rail transportation where, first, a state authority is not certified by the ICC to regulate the intrastate traffic, (49 U.S.C. §11501(b)(4)) or second, a state has exercised its authority in a manner "inconsistent with an order of the Commission issued under this subtitle," or, in a manner prohibited by same. 49 U.S.C. §§10501(c), 11501(c). In short,

the ICC, either directly or indirectly, is given authority over intrastate rail traffic.

However, the ICC's jurisdiction over *motor carriers* does not extend that far. Section 10520 of Subchapter II of Title 49 gives the ICC general jurisdiction over the interstate motor carrier traffic. However, with the exception of certain motor carriers of *passengers*, the ICC has no preemptive authority over the intrastate motor carrier traffic. 49 U.S.C. §10521(b)(1).

B. *ATA Does not Expand the ICC's Jurisdiction to Include Intrastate Motor Carriage*

In 1981, the ICC, acting under 49 U.S.C. §10505, exempted *on an interstate basis* the rail transportation of trailers and containers on flat cars, and the related railroad-owned truck service. *Improvement of TOFC/COFC Regulation*, 364 ICC 731 (1981). That exemption was challenged in *ATA*, upon which the ICC and the Railroads principally rely in asserting that the case at bar should be reversed. It was argued in *ATA* that truck service provided by railroads was not "a matter related to a rail carrier providing transportation subject to the jurisdiction of the [ICC] under this subchapter", within the meaning of §10505, the exemption authority. The Fifth Circuit, while noting both the lack of legislative history and the breadth of the provision in question, held that "rail-owned truck TOFC/COFC service is 'transportation that is provided by a rail carrier.'" 656 F.2d at 1120. The Court added that '[h]ad Congress intended to limit the Commission's exemption authority to rail transportation, it could easily have done so by using that language." *Id.* The Court of Appeals, with seeming reluctance, acknowledged an argument that the jurisdiction over the truck service might be under Subchapter II and, thus, not a proper subject for the exercise of an "arguably ambiguous grant of exemption authority found in subchapter I." 656 F.2d at 1122. The Court concluded, however, that "[the argument was not] sufficient to overcome the broad plain language used in §§10505(a) and 10505(f)." *Id.*

In *ATA*, the Court's conclusion that §10505 did include the power to exempt the over-the-highway movement of TOFC traffic, was based at least in part on the definition of "transporta-

tion" found at 49 U.S.C. §10102(25), which includes "locomotive, car, vehicle, motor vehicle, vessel..." "or equipment of any kind related to the movement of passengers or property" (emphasis added) all under the same definition. The Court of Appeals observed in *ATA:*

> ...transportation has been defined, to include motor vehicle services; while some sectons of the Act apparently do use the word only with reference to a single mode of transportation, e.g., *See,* 10542, other sections contemplate the broader, statutory definition. e.g., §10523.

656 F.2d at 1120 (footnote 9).

The State of Texas submits that, insofar as the Fifth Circuit in *ATA* accepted the idea that §10102(25) represented a broad overall definition of "transportation", that same Court of Appeals found this conclusion clearly wrong and clarified its holding in the case at bar. The *ATA* court's overly broad definition of "transportation" was incorrect for two reasons. The first, and more obvious one, is that §10102(25)(A), which includes a variety of transportation equipment, is in the disjunctive, and plainly does not mean all forms of transportation in all cases. The second, and more subtle reason lies in the legislative history of that provision, originally enacted as part of Public Law 95-473. The House Report on that statute explains the meaning of the bill:

> Substantive change not intended. — Like other codifications undertaken to enact into positive law all titles of the United States Code, this bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to change substance. *In a codification statute, however, the courts uphold the contrary presumption: the statute is intended to remain substantively unchanged.* 1978 U.S. Code Cong. and Ad. News p. 3,018 (Emphasis added).

In short, §10102 was merely a codification and consolidation of the prior sections of definitions in Title 49. Therefore, with regard to Clause (25) defining "transportation", the real meaning must be obtained from the previous meanings assigned under Title 49, which were separate for rail carrier, motor carrier and water carrier. 49 U.S.C. 1(3)(a) (1959), *repealed by* Pub.L. 95-473, §4(b), Oct. 17, 1978, 92 Stat. 1466, (current version at 49 U.S.C. §10102 Supp. 1986) [rail]; 49 U.S.C. 303(a)(19) (1963), *repealed by* Pub.L. 95-473, §4(b), Oct. 17, 1978, 92 Stat. 1466; Pub.L. 97-449, §7(b), Jan. 12, 1983, 96 Stat. 2444, (current version at 49 U.S.C. §10102 Supp. 1986) [motor carrier]; 49 U.S.C. 902(g),(h) (1963), *repealed by* Pub.L. 95-473, §4(b), Oct. 17, 1978, 92 Stat. 1466, (current version at 49 U.S.C. §10102 Supp. 1986) [water carrier]. Each definition is mutually exclusive of the other; "transportation" in the rail carrier section mentions nothing about motor vehicles. Certainly, since §10102 effected no substantive changes, the meaning of "transportation" when it is applied to rail carriers does *not* include motor vehicle.

As pointed out by the Fifth Circuit in the case at bar, the major saving grace of the exemption in *ATA* was that, although the scope of the exemption was outside of Subchapter I, where the exemption power lies, the ICC was still acting in an area where it had jurisdiction, that of interstate motor carriage. In other words, if an usurpation of power had been made through the exemption, the ICC had only taken it from itself.

Surely, the ICC purporting to act under the broad "matter related to a rail carrier" language of §10505, could not exempt rail carriers from regulation on other matters totally beyond the ICC's authority. Yet, the literal language of §10505 does not limit the exemption power to matters within the ICC's jurisdiction. Under the ICC's expansive reading of §10505, rail carriers could be exempted by ICC edict from regulation of air service and safety requirements of the Federal Aviation Administration if the trailers on flat cars were loaded on airplanes instead of put on the highways. Likewise, the regulations of the Securities and Exchange Commission, the Environmental Protection Agency, the Occupational Health and Safety Administration, or any other agency could be found burdensome by the ICC and lifted from the shoulders of the railroads. Of greater import to Texas, however, is the possibility that under

the ICC's theory the trucks operated by the railroads, already free of the RCT's requirements concerning insurance and hours of driver operations, could be relieved from complying with the Texas laws prohibiting over-weight and over-size vehicles, and requiring licensing and vehicle safety inspection. Congress cannot have intended such results. The ICC cannot be permitted to exempt matters over which it has no jurisdiction. One cannot give away what one does not possess.

Clearly one area in which the ICC has no jurisdiction is intrastate motor carriage, such as the highway movements herein. This area is, and has always been, subject to the control of the states, and is actively regulated in Texas by the Railroad Commission. The attempt by the ICC to secure for itself that jurisdiction through further preemption of state jurisdiction is both unjustified and unauthorized.

C. *Preemption Analysis: No Preemption Absent "Clear and Manifest Purpose"*

The doctrine of preemption is based on the Supremacy Clause of the United States Constitution, art. VI, cl. 2. The Supremacy Clause provides that federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." A state law may be contrary to federal law and therefore preempted, in either of two general ways. First, if Congress intended to occupy a given field exclusively, any state law within that field is preempted. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 621 (1984) *reh. denied*, 104 S.Ct. 1430 (1984); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-526, 97 S.Ct. 1305 (1977). Second, in areas that Congress did not intend to occupy exclusively, state laws are valid unless they actually conflict with federal law, in which case they are preempted. *Id.*

Absent strong and unequivocol evidence of Congressional intent, courts will not find that Congrss has taken over a given field and displaced all state regulation. Before depriving the states of their historic right to exercise their police powers in an area, courts have required a demonstration that complete ouster was Congress's "clear and manifest purpose." *De Canas v. Bica*, 424 U.S. 351, 357 (1976); *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1983). Express

statutory language is the principal evidence of congressional intent to occupy a field of regulation exclusively. *See Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 204 (1983).

(1) Explicit Statutory Limitation on Federal Preemption of Intrastate Motor Carriage

The State of Texas does not contest that Congress has clearly preempted state economic regulation of intrastate rail traffic either directly or indirectly pursuant to 49 U.S.C. §11501(b) and (c).[2] Rather, the State contends that it is equally clear that preemption does not extend to intrastate motor carriers of property because of the explicit proscription in §10521(b) as follows:

> (b) This subtitle does not-
> (1) except as provided in sections 10922(c)(2), 10935 and 11501(e)[3] of this title, affect the power of a State to regulate intrastate transportation provided by a motor carrier;...

(2) Implied Preemption: No Congressional Intent to Displace the Field as to Intrastate Motor Carriers of Property.

In *Pacific Gas and Electric* this Court ruled that although Congress had, through the Atomic Energy Act, preempted the field as to the safety regulation of nuclear power plants the states could determine "as a matter of economics — whether a nuclear plant vis-a-vis a fossil fuel plant should be built." 461 U.S. 222. Here, unlike *Pacific Gas and Electric*, there is specific statutory language (49 U.S.C. §10521) and a long history of state regulation over motor carriers which militates in favor of

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2. Section 11501 entitled "Interstate Commerce Commission Authority over Intrastate Transportation" grants preemption for three classes of carriers: 1) freight forwarders, 11501(a); 2) rail carriers, 11501(b) - (d); and 3) motor common carriers *of passengers*, 11501(e). Conspicuously absent are motor common carriers of property, at issue in the instant case.

3. Sections 10922(c)(2), 10935 and 11501(e), relate to motor carriers of passengers, conforming 10521 with the express exemptions from State authority in 11501. See footnote 2 above.

the conclusion that Congress did not intend to preempt states from the regulation of intrastate motor carriage within their respective borders.

The holding in *Pacific Gas and Electric* indicates that even without the specific reservation of regulatory power to the states contained in 49 U.S.C. §10521, the acknowledged preemption relating to intrastate *rail* traffic does not implicitly subsume the legitimate interests of the states involved in the economic and safety regulation of *intrastate* motor carriage.

These economic considerations were addressed by the RCT hearings examiner in the Road-Rail application, as follows:

> The Commission must be concerned about the viability of motor carriage for at least two reasons. One, a healthy motor carriage industry is the predicate for this exemption [under 49 U.S.C. §10505]. One of the protections to shippers from the abuse of market power by Road-Rail is the availability of transportation alternatives. Motor common carriage is a major one.
>
> Secondly, pursuant to Tex. Rev. Civ. Stat. Ann. art. 911b § 4(d), the Commission is charged to regulate motor carriers "so as to carefully preserve, foster and regulate transportation." An exemption for railroad motor carriage would place the exemption power of the Commission at war with its regulatory duty. Road-Rail has not submitted any authority that would relieve the Commission of its regulatory duty other than the ICC action regarding interstate traffic. (Jt. App. - p. 30)

In both the Road-Rail and the MKT applications the RCT found that, "[i]f both the ground and rail movements were exempt then the railroads would be at a competitive advantage over regulated intrastate state (sic) motor carrier service." (Jt. App. - pp. 16, 31). In addition to these economic considerations, the other tests for implicit preemption are not applicable to this case.

In the absence of explicit preemptive language, congressional intent to displace all state regulation may be inferred only if:

(a) "'a scheme of federal regulation [exists that is] so pervasive as to make reasonable the inference that Congress left no room to supplement it;'" (b) the federal law "'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject;'" or (c) "'the object sought to be obtained by the federal law and the character of the obligations imposed by it'" reveal a congressional purpose of excluding all state action. *Pacific Gas and Electric*, 461 U.S. at 204. Courts have consistently rejected claims that Congress has impliedly preempted a given field whenever one of these is not extant, or other equally strong proof of Congressional intent to displace state regulation is lacking. *See, e.g., Arkansas Electric Cooperative v. Arkansas Public Service Commission*, 461 U.S. 375, 103 S.Ct. 1905, 1915 (1983). Here, the specific proscription against federal regulation of intrastate motor carriers of *property* excludes implied preemption.

(3) Conflict with Federal Law: No Legal or Factual Conflict

Courts are also extremely reluctant to find preemption of state law because of actual conflict with federal law. Here, too, preemption is disfavored in recognition of the states' historic right to exercise their police powers. An actual conflict may be explicit in the sense that compliance with both federal and state law is physically impossible. *Silkwood*, 104 S.Ct. at 261; *Pacific Gas and Electric Co.*, 103 S.Ct. at 1722. Or, an actual conflict may arise implicitly when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). A finding of preemption on the basis of conflict between state and federal law is justified only if it is impossible to reconcile the operation of both statutory schemes with one another. *De Canas*, 424 U.S. at 357, n. 5 (citations omitted).

Certainly, in light of the clear wording of §10521(b), there can be no question of any conflict between state statutes regulating motor carriers of property (Tex. Rev. Civ. Stat. Ann. art. 911b) and federal statutes regulating same. Indeed, the ICC and the Railroads do not assert any such conflict. Yet, the ICC

claims that under 49 U.S.C. §11501(c) it has acquired jurisdiction over motor carrier service by a railroad due to the RCT's decertification. The House Conference Report on §11501 (Section 214 of the Staggers Act) describes that provision as follows:

> Accordingly, the Act preempts state authority over *rail* rates, classification, rules and practices. H.R. No. 96-1430, 96th Cong. 2nd Session (1980), *reprinted in* 1980 U.S. Code Cong. and Ad. News 4138.

Nowhere in the Congressional history does it indicate that §11501(b) - (d) has anything to do with motor vehicle transportation. As the Court of Appeals noted in *ATA*, the same is true in regard to §10505: "Our review of the competing contentions leaves us with some doubt as to whether Congress had any intent whatsoever on that issue." 656 F.2d at 1120. However in this case, unlike *ATA*, the issue is preemption or no preemption, and absent a clear Congressional intent, the issue must fall on the side of the State, since implied preemption is not favored. *DeCanas v. Bica*, 424 U.S. 351, 357 (1976); *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-57 (1963); *Schwartz v. State of Texas*, 344 U.S. 199, 202-203 (1952).

If further reason is needed to sustain the State's position, one might imagine the scenario in which (1) the RCT remained decertified by the ICC and (2) the ICC sought to revoke the exemption sought by the Railroads herein and reassert jurisidiction pursuant to §10505(d). That reassertion could only be effective as to the *rail* TOFC/COFC and Road-Railer movements because §10501 specifically provides for ICC jurisdiction over intrastate rail traffic where there is not a certified state agency. Yet the ICC could not reassert authority over intrastate motor carriage of property, because under §10521, such motor carrier jurisdiction is *specifically excluded*. In other words, just as the ICC cannot exempt that which it does not possess under §10505, the ICC cannot exercise regulatory authority it does not possess.

D. *The Fifth Circuit's Scenario is Appropriate.*

Both Petitioners have sharply denounced the Fifth Circuit's worst-case scenario which clearly exemplifies the potential harm

the ICC's order could cause to intrastate motor carrier regulation. However, neither the ICC nor the Railroads can overcome the essential truth of the Court of Appeals' example.

Both Petitioners point out that the Fifth Circuit refers to a small *intra*state railroad and assert that the ICC has no jurisdiction over intrastate railroads. Therefore, they contend, the example is inapposite. This complaint is clearly without substance. While it is true that the ICC orders in question herein pertain only to interstate railroads and related motor carriage, those orders purport to exempt only *intrastate* motor vehicle and rail operations performed by those railroads. Thus, the Court of Appeals' scenario applies to the intrastate operations which were sought to be exempted. Indeed, the lower court's example of the potential abuse which could occur as a result of use of unregulated motor carriage is strengthened by the fact that the larger interstate railroads have a greater ability to put a tremendous number of trucks on Texas highways than would a small intrastate railroad. Justice Politz's use of the phrase "potential mischief" understates the devastation that such fleets of rail-owned trucks could wreck upon Texas's regulated motor carriers if permitted the unfair competitive advantage of deregulation.

The ICC states that "there is no reason to think either that this example is realistic or that the Commission could not recognize and deal with a subterfuge." ICC Brief at p. 36. The State of Texas submits that it has no reason to believe otherwise. In point of fact, Road-Rail applied to the RCT for routes which included motor carriage from points as distant as Brownsville, Texas, to rail connection in Houston, Texas, a distance of over 300 miles. (Jt. App. - pp. 28-29[4]). Only after

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4. The RCT examiner concluded that:

> ...although the railroad movement in Road-Rail equipment may be limited to rail corridors, the scope of the application as proposed is not sufficiently limited to ensure the availability of transportation alternatives. Road-Rail testified that it will solicit ground movement of traffic as far as the economics dictate. Road-Rail envisions solicitation of road traffic to Houston from points as far as Brownsville and the Valley, a distance of over 300 miles. The line-haul movement by rail from Houston to Dallas will be approximately 240 miles (Houston and Dallas are the only scheduled intrastate stops of the South-West Xpress). According-

*(footnote continued on following page)*

this long journey as a motor carrier, would the Road-Rail equipment be placed on a railroad track for the 240 mile movement to Dallas. *Id.* Yet, despite these facts, the ICC willingly and quickly granted Road-Rail's requested exemption without investigation as to whether a subterfuge to avoid state motor carrier regulation may have been Road-Rail's true intent.

The State of Texas submits that based on the ICC's ruling in the Road-Rail case, the ICC will not investigate on its own initiative future operations by railroad-owned trucks which it has ordered exempt from regulation. Nor is the ICC likely to hear a complaint about such an operation from a state it has decertified from regulating rail traffic.

E. *Railroad-owned Motor Vehicles are "Motor Carriers"*

The ICC argues at some length that motor carriage in rail-owned vehicles, in connection with a measure of rail movement, is not transportation by a motor carrier subject to the jurisdictional limitations of 49 U.S.C. §10521. However, these arguments do not withstand scrutiny.

The question of whether a given type of vehicular traffic constitutes a "motor carrier" operation does not depend on ownership of the vehicle. Clearly the ICC would not find that trucks owned by a grocery store, but used to transport property for others across state lines for compensation, to be engaged in transportation other than as a motor carrier. The initial pertinent inquiry under both Texas and federal law, in determining whether a carrier is a "motor carrier" is whether the transportation is by a motor vehicle transporting property for compensation.[5] The Interstate Commerce Act definition of

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ly, Road-Rail will be soliciting road transportation at distances greater than it will be moving the traffic by rail. (Tr. 42). In those instances, Road-Rail's primary business will be motor carriage. (Jt. App. - pp. 28-29).

5. Compare: 49 U.S.C. §10102(12)-(14),

(12) "motor carrier" means a motor common carrier and a motor contract carrier.

(13) "motor common carrier" means a person holding itself out to the general public to provide *motor vehicle transportation for compensation* over regular or irregular routes, or both.

*(footnote continued on following page)*

"motor vehicle" specifically excludes equipment "operated only on a rail". 49 U.S.C. §10102(16). Conversely, the definition of "railroad" does not include motor vehicles. 49 U.S.C. §10102(20). Yet, the ICC contends that the motor carriage in connection with TOFC/COFC traffic is not motor carrier traffic because the railroads do not hold themselves out to the public to provide motor carriage. This argument is illogical and impossible to support. When a railroad represents that it is providing TOFC/COFC service, that railroad is *necessarily* holding itself out to provide both motor and rail carriage. That is the nature and advantage of TOFC/COFC service.

The ICC's strained construction of the relevant definitions creates unnecessary conflict, particularly between §11501 and §10521. In comparison, the Fifth Circuit's solution correctly harmonizes the statutory sections as follows: 1) the ICC can exempt *interstate* motor vehicle traffic in connection with TOFC/COFC movements, but 2) the ICC may not exempt similar *intrastate* motor carriage. Contrary to the ICC's assertion, this result does not do violence to the holding in *ATA*. Rather, the Fifth Circuit has simply refined its prior holding

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(14) "motor contract carrier" means —

(A) a person, other than a motor common carrier, providing motor vehicle transportation of passengers for compensation under continuing agreements with a person or a limited number of persons —

(i) by assigning motor vehicles for a continuing period of time for the exclusive use of each such person; or

(ii) designed to meet the distinct needs of each such person; and

(B) a person providing *motor vehicle transportation of property for compensation* under continuing agreements with one or more persons —

(i) by assigning motor vehicles for a continuing period of time for the exclusive use of each such person; or

(ii) designed to meet the distinct needs of each such person. [emphasis added].

with, Tex. Rev. Civ. Stat. Ann. art. 911b §1(g),

(g) The term "motor carrier" means any person, firm, corporation, company, copartnership, association or joint stock association, and their lessees, receivers, or trustees appointed by any court whatsoever owning, controlling, managing, operating, or causing to be operated any motor-propelled vehicle used in *transporting property for compensation* or hire over any public highway in this state, where in the course of such transportation a highway between two or more incorporated cities, towns, or villages is traversed. [emphasis added].

by clarifying the fact that while the ICC has expansive jurisdiction over interstate TOFC/COFC, the states retain jurisdiction over local motor carriage in connection with TOFC/COFC traffic.

F. *The Fifth Circuit Upholds Congressional Intent.*

Both the ICC and the Railroads assert that the decision in the case at bar subverts the Congressional intent behind the Staggers Act by creating burdensome dual regulation. However, these complaints are more appropriately addressed to Congress which has permitted the individual states to maintain jurisdiction over intrastate motor carriers of property.

Likewise, only Congressional action can solve the "problem" the Railroads attempt to demonstrate by a hypothetical situation in which a motor carrier movement from Dallas to Texarkana, Texas, is regulated whereas a similar shipment to Texarkana, Arkansas, is not regulated. Railroads' brief p. 11. The real complaint goes to the difference between intrastate motor carrier regulation, which is actively pursued in Texas, and interstate motor carriage which is only minimally regulated by the ICC. A line-haul motor carrier movement from Dallas to Texarkana, Texas, will generally be regulated by Texas, whereas a similar movement to Texarkana, Arkansas will not be regulated by Texas. The Railroads' hypothetical situation merely reflects the nature of motor carrier regulation from a point in one state to any two points close to the border of neighboring states, it bears no relation to whether motor carriage in connection with TOFC/COFC traffic can be exempted by the ICC. Any "disparity" in motor carrier regulation is Congressionally condoned.

In the instant case, the Court of Appeals properly refused to allow the ICC to unilaterally enlarge its jurisdiction to include a matter specifically reserved to the states.

G. *The Practical Impact Is Minimal.*

Despite the protests of the ICC and Railroads, the practical impact upon the railroads of the decision in question should be minimal unless, as the Fifth Circuit hypothesized, the railroads intend to expand their trucking operations in Texas

into a major industry. As the RCT's examiner reported in her October 19, 1983, proposal for decision:

> Truck service performed by motor carriers will continue to be regulated by the RCT. This will have minimal impact on the railroads, because *as pointed out in testimony by the railroads, virtually all of the various TOFC/COFC plans* used by shippers involving prior or subsequent movements by truck are within RCT established commercial zones and as such *are already exempt* from RCT jurisdiction. (Emphasis added) (Jt. App. - p. 18).

The proposition discussed by the examiner has been upheld in *Steve D. Thompson Trucking, Inc. v. State of Texas, et al.*, 685 S.W.2d 129 (Tex. App. - Austin 1985, writ ref'd, n.r.e.), wherein pre-rail and ex-rail pickup and delivery service by a private trucking company in connection with TOFC/COFC movements was held exempt from RCT regulation when the pickups and deliveries were made within Texas commercial zones.

These commercial zones in Texas are indeed quite extensive, covering the major metropolitan areas of the State. The Appendix attached hereto, sets out in full the RCT regulations enacting the current commercial zones. Additional zones can be added by the RCT. Tex. Rev. Civ. Stat. Ann. art. 911b §1(g).[6] It should also be noted that most of the truly

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6. Art. 911b §1(g) includes three provisos following the definition of "motor carrier" (see n. 5 supra), as follows:

Provided, that the term "motor carrier" as used in this Act shall not include, and this Act shall not apply to motor vehicles engaged in the transportation of property for compensation or hire between points:

(1) Wholly within any one incorporated city, town or village;

(2) Wholly within an incorporated city, town or village and all areas, incorporated or unincorporated, wholly surrounded by such city, town or village;

(3) So situated that the transportation is performed wholly within an incorporated and immediately adjacent unincorporated area without operating within or through the corporate limits of more than a single incorporated city, town or village, except to the extent provided in (2) above; or

(4) Wholly within the limits of a base incorporated municipality and any number of incorporated cities, towns and villages which are immediately contiguous to said base municipality.

incidental pre-rail and ex-rail pickup and delivery service, in and around municipalities, is likewise exempt under the Texas Motor Carrier Act. *Id.*

The State only seeks to regulate the non-exempt highway transportation between two or more incorporated cities. Unlike similar movements in other states, in Texas these movements often include many miles of highway. For example, in the Railroads' hypothetical shipment by rail from Houston to Dallas and thence by motor vehicle to Texarkana, Texas, the motor vehicle covers more than 180 miles of Texas roads. The State must be able to regulate motor carriage of this magnitude.

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Provided further, that motor carriers authorized to serve any incorporated city, town or village within the areas described in (2), (3), and (4) above, except carriers of commodities in bulk in tank trucks and all specialized motor carriers, may perform service for compensation or hire between all points within the areas described in (2), (3) and (4) above, on the one hand, and, on the other, authorized points beyond such areas without a certificate or permit authorizing service at all points within such areas when such transportation is incident to, or a part of, otherwise regulated transportation performed under a through bill of lading.

Provided further, that after notice and public hearing the Railroad Commission of Texas is hereby authorized, except as to operations of carriers of commodities in bulk in tank vehicles and all specialized motor carriers, from time to time and where necessary, to define and prescribe, and where necessary shall prescribe, commercial zones adjacent to and commercially a part of any specified incorporated municipality and within which operations as a motor carrier may be performed without a certificate or permit authorizing same and within which strictly local service wholly within such commercial zone may be performed at rates and charges other than those prescribed by the Commission. The Commission in so determining and prescribing the limits of any commercial zone shall take into consideration its powers and duties otherwise to administer and enforce the Motor Carrier Act considered in the light of the economic facts and conditions involved in each commercial zone or proposed commercial zone, particularly the effect that unregulated transportation for compensation or hire within such zone or proposed zone has had or may have upon fully regulated motor carriers operating in regulated intrastate commerce to, from and within such commercial zone. The Railroad Commission is empowered to prescribe such rules and regulations for operation of such transportation as the Commission deems in the public interest.

H. *The Decision Below is not Contrary to this Court's Recent Precedent*

The Railroads take the position that the decision below conflicts with this Court's recent holding in *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi*, 474 U.S. _____; 106 S.Ct. 709; 88 L.Ed. 2d 732 (1986) ("Transco"). That reliance is misplaced.

In *Transco*, the Court reversed an order of the Mississippi Oil and Gas Board requiring Transcontinental Gas Pipe Line Corporation to "ratably take" gas from the Harper Sand gas pool. The gas in that field had been classified as "high cost" natural gas under §107(c)(1) of the Natural Gas Policy Act, 15 U.S.C. §3301, et seq. ("NGPA"), and as such, was exempted from the otherwise pervasive jurisdiction of the Federal Energy Regulatory Commission ("FERC"). However, as the opinion noted, the decision to remove "high cost" gas from FERC's jurisdiction was not tantamount to Congressional intent that states should fill the regulatory void. Thus, the *Transco* case stands for the proposition that a clear federal intent to leave an area *un*regulated has as much preemptive effect as an affirmative federal decision *to regulate*. 106 S.Ct. 709, 717; *See also Arkansas Electric Cooperative v. Arkansas Public Service Commission, supra.*

Contrary to the Railroads' assertion, the facts in *Transco* are different from the situation here. What distinguishes the case at bar from *Transco* is the express reservation of power to the states in 49 U.S.C. §10521(b) allowing them to continue to regulate intrastate transportation provided by a motor carrier of property. That is, while the Railroads correctly contend that the implementation of the Staggers Act demonstrates Congressional intent to largely substitute market forces for regulation, they incorrecty conclude that the states are thereby ousted from *all* regulation affecting railroads unless the states first have been certified by the ICC.

Section 10521(b) reserves to the states certain intrastate jurisdiction. As such, the *Transco* case cited by the Railroads is inapposite. The present dispute is not a case where Texas has sought to fill a regulatory void as Mississippi attempted

to do in *Transco;* rather, it is an instance of a state exercising those powers expressly reserved to it by the statute.

Curiously, while the Petitioners rely on *Transco* to assert that Texas cannot "step in" and replace federal regulation, neither the ICC nor the Railroads mention a more recent and more important case decided by this Court, *Louisiana Public Service Commission, et al. v. Federal Communications Commission,* _____ U.S. _____, 106 S.Ct. 1890, _____ L.Ed. 2d _____ (1986) (*"Louisiana PSC"*). Texas submits that *Louisiana PSC* controls the disposition of this case.

In *Louisiana PSC* the Federal Communications Commission ("FCC") raised the same arguments as the ICC and the Railroads do here. The FCC contended that §220(b) and §151 of the Communications Act of 1934 ("Communications Act"), 47 U.S.C. §151 et seq., gave it jurisdiction to preempt contrary depreciation practices adopted by the states. The argument was based on the notion that §220(b) of the Communications Act gave the FCC an exclusive grant of power to set depreciation rates and if states were allowed to set different rates they would frustrate the larger federal policy of increasing competition in the telecommunications industry.

That argument failed in *Louisiana PSC* for the same reason the Petitioners' argument fails here; there remains a reservation of power to the states which, in this case allows them to continue regulating those aspects of intrastate motor carriage which Congress has expressly withheld from the ICC. In *Louisiana PSC* the FCC was prevented from encroaching on intrastate depreciation rates and practices by §152 of the Communications Act which states in pertinent part (47 U.S.C. §152(b)):

> Except as provided in section 224 of this title and subject to the provision of section 301 of this title and subchapter V-A of this Chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier...

When compared with the language of 49 U.S.C. §10521(b), it is clear that Texas acted wholly within the regulatory sphere reserved to it by the very statute under which the ICC purported to preempt. That exercise of jurisdiction by the state was not Constitutionally infirm and the Fifth Circuit's recognition of that fact should be affirmed.

## CONCLUSION AND PRAYER

For the reasons stated herein, the State of Texas respectfully prays that the judgment and opinion below be in all things affirmed.

Respectfully submitted,

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# APPENDIX A

# COMMERCIAL ZONES

## §5.291(051.03.16.001). Designation of Commercial Zones.

After notice and public hearing, the commission may, where necessary, define and prescribe commercial zones, each of which shall comprise the geographical area which is adjacent to and commercially a part of an incorporated municipality. Except as to transportation of commodites in bulk in tank vehicles and except as to all specialized motor carriers, the following exemptions are provided with regard to operations within said commercial zones:

(1) Operations as a motor carrier therein may be performed without a certificate or permit authorizing same.
(2) Strictly local service wholly within any such commercial zone may be performed at rates and charges other than those prescribed by the commission.

## §5.292 (051.03.16.002). Factors Considered by the Commission.

In determining the necessity of the designation of an area as a commercial zone, the commission shall take into consideration its powers and duties under the motor carrier act in view of the economic conditions in each proposed or established commercial zone, and particularly the effect that unregulated transportation has had or may have upon fully regulated motor carriers operating to, from, and within such commercial zone.

## §5.293 (051.03.16.003). Restrictions on Exemptions.

(a) The existence of a commercial zone shall not in any manner affect the rates on shipments between places or points within the prescribed commercial zone and places or points beyond such zone.
(b) The existence of a commercial zone shall not in any manner affect the pick-up or delivery service, or both, on shipments moving between places and points within the prescribed commercial zone and places or points beyond such zone.

**§5.294.Existing Commercial Zones.**

Commercial zones defined and prescribed by the commission after notice and hearing are as follows:

(1) The Dallas commercial zone shall include the following:

(A) The incorporated City of Dallas.

(B) The incorporated City of Fort Worth.

(C) The following cities and towns which are adjacent to and commercially a part of the City of Fort Worth: Haltom City, Watauga, Richland Hills, North Richland Hills, Hurst, Bedford, Colleyville, Grapevine, Euless, Arlington, Pantego, Dalworth Gardens, Kennedale, Forrest Hill, Everman, Burleson, Crowley, Edgecliff, Benbrook, Aledo, White Settlement, Westover Hills, Westworth Village, River Oaks, Sansom Park, Lake Worth Village, Lakeside, Azle, Saginaw, Mansfield, and Blue Mound.

(D) The following cities and towns which are adjacent to and commercially a part of the City of Dallas: Highland Park, University Park, Renner, Plano, Richardson, Buckingham, Garland, Rowlett, Mesquite, Sunnyvale, Balch Springs, Kleberg, Seagoville, Hutchins, Wilmer, Fruitdale, Lancaster, De Soto, Woodland Hills, Cedar Hill, Duncanville, Cockrell Hills, Grand Prairie, Irving, Coppell, Carrolton, Farmers Branch, Addison, and Lewisville.

(E) The county of Rockwall.

(F) The City of Wylie.

(2) The Fort Worth commercial zone shall include the following:

(A) The incorporated City of Fort Worth.

(B) The incorporated City of Dallas.

(C) The following cities and towns which are adjacent to and commercially a part of the City of Dallas: Highland Park, University Park, Renner, Plano, Richardson, Buckingham, Garland, Rowlett, Mesquite, Sunnyvale, Balch Springs, Kleberg, Seagoville, Hutchins, Wilmer, Fruitdale, Lancaster, De Soto, Woodland Hills, Cedar Hill, Duncanville, Cockrell Hills, Grand Prairie, Irving, Coppell, Carrolton, Farmers Branch, Addison, and Lewisville.

(D) The following cities and towns which are adjacent to and commercially a part of the City of Fort Worth:

Haltom City, Watauga, Richland Hills, North Richland Hills, Hurst, Bedford, Colleyville, Grapevine, Euless, Arlington, Pantego, Dalworth Gardens, Kennedale, Forrest, Hill, Everman, Burleson, Crowley, Edgecliff, Benbrook, Aledo, White Settlement, Westover Hills, Westworth Village, River Oaks, Sansom Park, Lake Worth Village, Lakeside, Azle, Saginaw, Mansfield, and Blue Mound.

(3) The Houston commercial zone shall include the incorporated City of Houston and the following cities, towns, and areas which are adjacent to and commercially a part of the City of Houston: Spring Valley, Hedwig Village, Hunter's Creek Village, Piney Point Village, Hilshire Village, Bunker Hill Village, Bellaire, West University Place, Southside Place, Galena Park, Jacinto City, Missouri City, Pearland, Friendswood, Webster, League City, Seabrook, Shoreacres, La Porte, Lomax, Deer Park, Pasadena, South Houston, Baytown, El Lago, Taylor Lake Village, Jersey Village, Humble, and the areas lying within the channel easement and adjacent unincorporated areas bounded on the north by Interstate Highway 10, eastward to Baytown, and on the south by State Highway 225 eastward to La Porte, and the channel easement from its origin in midtown Houston to Galveston Bay; the Bayport, Clear Lake City, and NASA developments; the unincorporated area in southeast Harris County lying south of State Highway 225, north of the Harris County-Galveston line, and east of Pearland and Friendswood; Stafford; and an area embracing all points within one mile of the present location of the United States Post Office which is designated in the *United States Postal Guide* as the town of Highlands, Texas; Sugar Land, Texas City, La Marque, Hitchcock, Galveston, Manvel, Dickinson, Alvin, Katy, Tombal, and Conroe.

(4) The San Antonio commercial zone shall include the following:

(A) The incorporated City of San Antonio.

(B) The following cities, towns, military establishments, and areas which are adjacent to and commercially a part of the City of San Antonio: Balcones Heights, Castle Hills, Hill Country Estates, Olmos Park, Alamo Heights, Terrell Hills, Fort Sam Houston, Windcrest, Kirby, Brooks Air Force Base, East Kelly Air Force Base, Kelly Air Force

Base, Leon Valley, Lackland Air Force Base, Hollywood Park, Live Oak, Shavano Park, and China Grove.

(5) The Beaumont, Orange, and Port Arthur commercial zone shall include the following:

(A) The incorporated City of Beaumont.

(B) The incorporated City of Orange.

(C) The incorporated City of Port Arthur.

(D) The following cities, towns, and areas which are adjacent to and commercially a part of the City of Beaumont: the unincorporated area bounded by the corporate limits of Beaumont and a line beginning where Interstate Highway 10 crosses the southwest corporate limits of Beaumont, thence in a southwesterly direction along Interstate Highway 10 to its intersection with FM Road 365, thence in an easterly direction along FM Road 365 to the corporate limits of Port Arthur, thence in a northerly and easterly direction along the westerly and northerly corporate limits of Port Arthur, Nederland, Port Neches, to the south bank of the Nueces River thence along the south bank of the Neches River to a point where the south bank meets Beaumont city limits west of the Mobil Oil Company property across the Neches River from the corporate limits of Orange (as created by the 1960 Orange strip annexation).

(E) The following cities, towns, and areas which are adjacent to and commercially a part of the City of Orange: Pinehurst, West Orange; the unincorporated area within and surrounded by the corporated limits of Orange; and the unicorporated area north of Orange bounded on the east by the Sabine River, on the north by a county road that runs east-northeast, on the west by State Highway 87 and on the south by the corporate limits of Orange.

(F) The following cities, towns, and areas which are adjacent to and commercially a part of the City of Port Arthur: Lakeview, Pear Ridge, Griffing Park, Nederland, Port Neches, and Groves; the unicorporated area bounded by the corporate limits of Port Arthur, Nederland, Port Neches, and Orange; Port Neches; the unicorporated area within and surrounded by the corporate limits of Port Neches, Groves; the unincorporated area within and surrounded by the corporate limits of Port Arthur; and the

unincorporated area south of FM Road 365 between the corporate limits of Port Arthur and a line beginning where the west bank of Hillebrant Bayou is crossed by FM Road 365, thence along the west bank of Hillebrant Bayou to its confluence with Taylor's Bayou, thence in a southeasterly direction along the west and south banks of Taylor's Bayou, (including the whole of Gulf Oil Corporation's and Sinclair-Koppers Company's property and docks) to its confluence with the gulf intracoastal waterway, thence along the west and north banks of the gulf intracoastal waterway to the corporate limits of Port Arthur.

(6) The Corpus Christi commercial zone shall include:

(A) The incorporated City of Corpus Christi.

(B) The territory enclosed by a line beginning at the intersection of the southern boundary of Nueces County and the line of mean low tide on the gulf shoreline of Padre Island; then westward along the southern boundary of Nueces County to the first inland road at or near the Laguna Madre, at a point called Hardpan; then northerly on the road from Hardpan to its intersection with FM Road 70; then along FM Road 70 to its intersection with Highway 286 southerly to the Nueces County line; then westerly on the Nueces County line to its intersection with Petronila Creek; then northwesterly along Petronila Creek to its intersection with FM Road 70; then westerly on FM Road 70 to its intersection with FM Road 892; then northerly on FM Road 892 to its intersection with FM Road 2826; then westerly on FM Road 2826 to its intersection with FM Road 666; then northeasterly on FM Road 666 to its intersection with the municipal limits of Banquete, Texas; then westward and northward along the municipal limits of Banquete, Texas, to the Texas-Mexican Railway railroad track; then westerly on the Texas-Mexican Railway tracks to the Nueces County line; then northward and eastward along that line to the centerline of the Nueces River; then northerly and westerly (upstream) along the centerline of the bed of the Nueces River to the dam on the Nueces River impounding Lake Corpus Christi; thence to the upstream side or face of the said dam northward and eastward along the dam to the shoreline of Lake Corpus Christi; thence northwesterly with the meanders of

the said shoreline to the most distant intersection of the said shoreline with the boundary of Lake Corpus Christi State park; thence northeasterly along the northern boundary of the park; thence southwesterly along the northeastern boundary of the said park to the point where such boundary first intersects a line parallel to and 1,000 feet distant from the centerline of FM 1068; thence along such line to the city limits of Mathis; then northward and eastward along and around the Mathis city limits to the point where such city limits intersect the centerline of FM 3024; then souteastward along the Mathis city limits line to a point on such line 300 feet northwesterly of the centerline of State Highway 359 across IH 37 to a point 1,000 feet from the centerline of IH 37; then southeasterly along a line parallel to and 1,000 feet northeastward of IH 37 to the intersection of such line with a line parallel to and 300 feet northward of the centerline of FM 881; then eastward along such line parallel to and 300 feet northward of FM 881 to the western city limits of Sinton, Texas; then around the northern boundaries of the city of Sinton, to a point on the eastern side of Sinton where the city limits intersects a line parallel to and 1,000 feet distant from the centerline of U.S. Highway 181 on the northward side of said highway; then southeasterly along such line parallel to U.S. 181 to the city limits of Taft; then northeasterly and around the city limits of Taft in a clockwise direction to the intersection of the Taft city limits with a line parallel to and 1,000 feet distant from the centerline of U.S. Highway 183 on the northward side of the said Highway 181; then along said line parallel to U.S. Highway 181 to the intersection of the said line with the western city limits of Gregory, Texas; then northeasterly and clockwise around the city of Gregory to the point where the city's boundary first intersects a line parallel to and 1,000 feet distant from the centerline of State Highway 35; then northeasterly along such line parallel to but northward and westward from State Highway 35 to a point where such line intersects the city limits of Aransas Pass; then northeasterly along the city boundary to a point where it intersects the common boundary of Aransas and Nueces Counties; then continuing first northeasterly then southeasterly along the boundary of the city of Aransas Pass across State Highway 35 to the intersection of the said common boundary and the centerline of the Gulf Intracoastal Waterway in Redfish Bay; then northeasterly to the most northward point of

the said centerline in Nueces County; then along the common boundary of Nueces and Aransas Counties to the point such common boundary intersects the city limits of Port Aransas; then along the northerly and easterly city limits of Port Aransas to their most southerly reach on the mean low tide line on the gulf shoreline of Mustang Island; then southward along the mean low tide line of the gulf shoreline of Mustang Island to the gulf shoreline of Padre Island, crossing the jettied channel immediately north of Mustang Island State Park by projecting the line of mean low tide as if such jetties and channels were not built; then southward along the said mean low tide line of the Gulf of Mexico on Padre Island to the point of beginning, and including all the area enclosed by the boundaries described in this subparagraph.